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No. 04-70

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EXXON CORPORATION,

Petitioner,

v.

ALLAPATTAH SERVICES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Respondents (herein, "Plaintiffs" or the "Class") incorporate by reference Exxon's identification of the parties to this proceeding in its petition for certiorari ("Pet."). With respect to each of the corporate Respondents (all identified corporations other than Exxon Mobil Corporation), there is no parent corporation or publicly held corporation that has a 10% or greater ownership interest in the corporate Respondent.

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OPINIONS BELOW

The principal orders addressing the propriety of class certification are the district court's orders (i) denying Exxon's two motions to decertify (168a-169a; 215a-219a), (ii) denying Exxon's motion for summary judgment, 61 F. Supp. 2d 1308, (iii) denying Exxon's motion to exclude Plaintiffs' expert and damage evidence based on *Daubert*, 61 F. Supp. 2d 1335, and (iv) denying Exxon's Rule 50 and Rule 59 motions (R.App. 1a-10a).

The order that Exxon's petition characterizes as "determining that the cause of action could proceed on a class-wide basis" (App. 172a) does not do so. This order is limited to the district court's determination that the Class could present, together with the case in chief, a fraudulent concealment avoidance to Exxon's statute of limitations defense.

INTRODUCTION

Exxon asserts two circuit conflicts as grounds for certiorari, one challenging *class certification* (an issue affecting one hundred percent of the damage award), and another, challenging *supplemental jurisdiction* over claims less than the minimum amount of the diversity statute (an issue affecting less than ten percent of the damage award). But Exxon presents the issues in the wrong order, as this Court has consistently held the potentially dispositive issue of class certification should be considered in advance of the determination of federal subject matter jurisdiction under the diversity statute. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999); *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 612 (1997). In this reply, we address Exxon's two issues in the appropriate sequence, which makes clear that the petition should be denied on both grounds advanced.

Class Certification

There is no conflict in the circuit court decisions, important issue, or any other compelling reason that warrants review of class certification. Exxon's initial premise, that the Eleventh Circuit's decision stands as authority for the proposition that "distorting the law of the applicable states" is appropriate in class actions "where individual reliance is an issue," is frivolous as the opinion, on its face, does nothing of the kind. Mis-characterization of the ruling is a predicate to Exxon's real argument that this Court should review *the district court's* analysis of the underlying facts and state laws to determine certification improper. This Court has always rejected such an undertaking. Were it to do so, the Court would find that Exxon's presentation of both the facts and state law is unsupportable.

Supplemental Jurisdiction

The question of supplemental jurisdiction in class actions has divided the circuits, and even this Court. The interests of the parties in this case, however, are not properly aligned to bring this issue into the sharp contrast the Court expects in resolving important issues of federal jurisdiction. Exxon has previously taken a public stance on this issue opposite to the one taken here. Moreover, Exxon has no financial stake in the outcome. If dismissed, class members with claims less than the jurisdictional amount of the diversity statute will simply refile their claims in state court, on a claim as to which Exxon's liability has already been determined.

Similarly, although Class counsel chose to bring this case in federal court, they are hardly appropriate advocates for the interests of the world's multi-national corporations which maintain that federal jurisdiction over class actions should be as expansive as possible. In addition, because of the advanced

stage of these protracted proceedings, and because there is an adequate and independent basis for diversity jurisdiction over the smaller claims, this case does not provide an appropriate vehicle to address the circuit split.

STATEMENT OF THE CASE

The Facts Established at Trial

Exxon's Petition offers as fact the now discredited version of the Discount for Cash ("DFC") program promoted to dealers during the Class period, ignoring the evidence introduced at trial (virtually all of which came from Exxon's witnesses, admissions and business records), the verdict of the jury, and the findings of the district court affirmed by the Eleventh Circuit.

The relationship between Exxon and its dealers is governed by uniform sales agreements under which Exxon was entitled to fix the wholesale price of motor fuel. P.Ex. 54. Such "open price" term contracts for the sale of goods are governed by section 2-305 of the Uniform Commercial Code, enacted in each of the 35 jurisdictions in which Exxon sold motor fuel to its dealer network.

Section 2-305 "rejects the uncommercial idea that an agreement that the seller may fix the price means that he may fix any price he may wish." Uniform Commercial Code (U.L.A.) § 2-305(2) (Official Comment 3). Rather, the seller is required to fix prices "in good faith," which the U.C.C. expressly defines in both subjective and objective terms as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." U.C.C. § 2-305,

Official Comment 4 (referencing U.C.C. § 2-103(1)(b) definition of "good faith" between merchants).[1]

The origin of Discount for Cash, the program that gave rise to the claim that Exxon's pricing practices violated its obligation to set prices in good faith, was not, as Exxon claims, a "response to competitive pressure from companies that did not offer credit cards" (Pet. at 4). Exxon's internal business records and the admissions of its officers at trial established that Discount for Cash was, instead, a concerted plan to persuade dealers to alter the economics of their businesses so that Exxon could increase its wholesale margins, reduce dealer incomes, and "facilitate" store closings, which Congress had made more difficult with the passage of the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq.* ("PMPA").[2]

Exxon's incentive to use Discount for Cash to achieve these ends arose from the events immediately following termination of government-imposed price controls by President Reagan in 1981. Exxon, along with other major oil companies, immediately increased wholesale motor

1. Official Comment 3 to section 2-305 states that the obligation to price in good faith is met "in the normal case" by a "price in effect" or the like. What is or is not "normal" or a "price in effect" are questions that turn on the facts and circumstances of each case.

2. The PMPA does not prohibit oil companies from closing stores, but requires companies like Exxon to allow terminated dealers to purchase their stations at fair market value. But as Exxon reduced its dealer network from 8,000 to 2,000 stores during the Class period, the last thing Exxon wanted was competition from its own former dealers in their own former stores. P.Ex. 53; Doc. 1535 Tr. 1876.

fuel prices. P.Ex. 21.[3] Exxon quickly discovered, however, that the competitive marketplace was also an unwelcome constraint on its prices.

After suffering huge losses of volume, market share, and as much as $100 million in revenue, Exxon was forced to lower its prices below what it wanted to charge. P.Ex. 21, 55. Analyzing its loss, Exxon discovered that vis-a-vis its major competitors, its brand value was weak, its retail chain was aged, and its business was concentrated in unprofitable markets. P.Ex. 55, 67; Doc. 1532 Tr. 1098-1102; Doc. 1535 Tr. 1887-93. Other companies had invested in their retail networks during price controls, Exxon had not. P.Ex. 67.

Exxon concluded that its service station dealers were making, on average, $9,000 per year (or 1.3 cents per gallon) "too much," and observed that when Exxon raised its wholesale prices, its dealers were able to protect their profits by increasing retail prices and margins on reduced volumes. P.Ex. 22, 56. This dealer trade-off forced Exxon to lower its prices to protect its market share. P.Ex. 21. Exxon decided that it needed to eliminate the dealers' ability to resist wholesale price increases and, at the same time, accelerate its plans to reduce dramatically the size of its dealer network. P.Ex. 22, 26, 53, 56; Doc. 1532 Tr. 1113, 1116. Exxon divided its dealers into "keepers" and "non-keepers" and anticipated that, because of the PMPA, unilateral store closings for the non-keepers could be "contentious." P.Ex. 32, 34, 35, 55, 59; Doc. 1535 Tr. 1868-69.

Exxon calculated that it could increase its profits by $85 million per year at the expense of the dealers if it could persuade them to segment retail prices into a credit

3. References to the record below are denoted "P.Ex." for Plaintiffs' exhibits admitted at trial and "Doc. __ Tr. __" for the trial transcript.

price and a lower cash price (hence "discount for cash"). The source of that additional profit would be a new 3% "credit cost recovery fee" (a price increase with a different label) that Exxon would impose on the dealers on all credit card sales. *Id.*

The key economic assumption of DFC was the price elasticity of demand. P.Ex. 22, 24, 67; Doc. 1532 Tr. 1109-1112. Segmenting retail prices into cash and credit prices would increase the price elasticity of demand of the products the dealers were selling to the public. *Id.*; P.Ex. 24, 69; Doc. 1537 Tr. 2645. Increasing price elasticity, Exxon calculated, would make it impossible for dealers to protect their own profits by taking higher retail margins on lower volumes, the behavior which forced Exxon, in 1981, to lower wholesale prices to protect its market share. *Id.*

Exxon's *internal* business plan provided that in the "short term," Exxon would impose the credit cost recovery fee and offset the fee with "on average" wholesale price reductions. P.Ex. 22, 23, 24, 26, 28; Doc. 1532 Tr. 1136-60, 1219-21; Doc. 1533 Tr. 1521-35. But in the "long term," when the overwhelming majority of its dealers had segmented their prices, Exxon would "recoup" the price reduction and "eliminate the short term requirement to reduce the [wholesale price]." *Id.*; P.Ex. 25, 47.

There was no dispute at trial that market forces would preclude dealers from protecting their own profits by passing on the new fee to their customers. Exxon's economics expert testified at trial:

> Under such economic conditions, if Exxon's retailers were subjected to the alleged overcharge or duplicative charge marketplace forces would preclude the formulaic pass through of such an

> overcharge or duplicative charge and would cause the resulting burden to be borne all or in substantial part by Exxon's retailers.

P.Ex. 69; Doc. 1541 Tr. 3773.

In August 1982, Exxon rolled out DFC nationwide to its dealers and the public. To induce its dealers to participate in this program that would actually harm their economic interests, Exxon developed a highly sophisticated marketing campaign. Exxon represented that DFC was good for the dealers' businesses because it would increase sales and profits while leaving dealer margins "unchanged." P.Ex. 29; 29B; 30; Doc. 1532 Tr. 1222-28. And Exxon promised that the new 3% credit cost recovery fee was merely an incentive to segment prices; it would not be a new cost because the fee would be offset with on-average wholesale price reductions. *E.g.*, P.Ex. 29; Doc. 1532 Tr. 1224.

Exxon unilaterally amended its standard form credit card agreement with all dealers to impose the 3% fee (P.Ex. 29A), and immediately lowered its wholesale prices by an offsetting amount. Doc. 1532 Tr. 1255. Exxon communicated the specifics of the program and the promised wholesale price offset uniformly to all dealers. Doc. 1532 Tr. 1222, 1276, 1285-86.[4] All of Exxon's communications carefully used the same words to describe the promised price offset:

> Exxon will remove from the dealer DTT

4. Proof of the specific and uniform representation was established from Exxon's rollout presentation, videotapes, brochures, dealer newsletters, press releases, Congressional testimony of Exxon officials, written materials provided to the dealers, written materials provided to consumer groups, public advertisements, Exxon's interrogatory answers, and the admissions of Exxon's witnesses. P.Ex. 29, 29A, 29B, 30, 39, 40, 71, 72, 156, 170, 282; Doc. 1532 Tr. 1222-28, 1234, 1276-79, 1285-86.

> [wholesale price] an amount which *on average* offsets the charge for credit to the dealer.

P.Ex. 29; *see also* P.Ex. 30, 39, 40, 72, 156, 170, 264, 282. In answers to Plaintiffs' interrogatories, Exxon explained that, because the pricing environment was dynamic, performance of its obligation to reduce prices "on average" must be measured "on average, over time and across markets." P.Ex. 39 (R.App. 11a-15a), P.Ex. 40.

The overwhelming majority of Exxon dealers demonstrated their belief in Exxon's representations by adopting DFC at retail. Doc. 1531 Tr. 942, 946. Approximately seven months after DFC was rolled out, however, and consistent with its "long term" plan, Exxon eliminated the offset. P.Ex. 2, 5, 5A, 5B, 9, 32, 33, 34, 35, 36, 37; Doc. 1537 Tr. 2684-85, 2693-95, 2738. Exxon was able to hide the effective price increase by simply lagging the market in reducing its prices during a period when oil prices were falling generally. P.Ex. 37; Doc. 1535 Tr. 2051. From March 1983 until the DFC program was ended in August 1994 (days after class certification), Exxon failed to provide the offset to the credit cost recovery fee. P.Ex. 2, 4, 5, 5A, 5B; Doc. 1537 Tr. 2667-2695.

Like its internal DFC plan, Exxon's actual wholesale prices were always a closely guarded secret available only to a small number of employees at Exxon's headquarters in Houston. P.Ex. 377. Without access to Exxon's actual wholesale prices to all dealers, no dealer or group of dealers could meaningfully question whether Exxon provided the on-average price reduction, or utilize what Exxon called the "on average, over time and across markets" means of measuring Exxon's performance. Thus, although the fortunes

of Exxon dealers declined under DFC, as Exxon had planned, the dealers lacked the means to know why.

Throughout the life of the program, Exxon continuously and formally assured the dealers that they were receiving the offset, P.Ex. 73, 74, 75, 76, 77, 79, 80, 81; Doc. 1532 Tr. 1080, 1223-24, 1240, Doc. 1533 Tr. 1395, 1476, 1486, 1488, and that the offset was provided to all dealers regardless of whether they participated in DFC. Doc. 1531 Tr. 942. Beginning in 1991, Exxon placed a line item for the DFC offset (*i.e.*, a stated price reduction of 1.3 cents per gallon) on every dealer motor fuel invoice. P.Ex. 50; Doc. 1533 Tr. 1402.[5]

Another important vehicle used by Exxon to promote DFC and keep dealers in the program was an organization Exxon had established called the National Dealer Advisory Council ("NDAC"). In his opening statement to the jury, Exxon's counsel aptly described the NDAC as "almost like a legislature." Doc. 1531 Tr. 923.

Each year, the NDAC held local and regional meetings and then an annual national meeting in Houston, attended by designated dealer representatives from around the country.

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5. At trial, Exxon advanced the argument that it had provided the offset by creating a price comparison to its competitors' prices. It contended its prices, "adjusted" for discount for cash, were "equal to or lower than its competitors' prices throughout every market." That argument was proven to be meritless for many reasons, among which was the indisputable fact that Exxon did not know what its competitors' prices were, since all of the real wholesale prices of Exxon's competitors, as distinguished from "posted" prices, were closely guarded secrets which Exxon was unable to obtain by virtue of corporate confidentiality and the antitrust laws. Doc. 1532 Tr. 1077-78; Doc. 1535 Tr. 1863.

Doc. 1532 Tr. 1062-63, 1244-45; Doc. 1533 Tr. 1431-32. In all of these meetings, Exxon and its dealers discussed their mutual concerns and Exxon communicated company policies and objectives. *Id.* Following the national NDAC meetings, the dealer representatives went back to their regions and reported to the local dealers on what had transpired in Houston. *Id.* In addition, minutes of NDAC meetings were maintained by Exxon and mailed to all dealers throughout the country. P.Ex. 73-77, 79-81, 84; Doc. 1532 Tr. 1062-63, 1240, 1244.

Each year the NDAC representatives asked whether Exxon continued to provide the offset for the credit fee. Every year until this suit was filed, Exxon assured them that it did, going so far as to provide complex charts and graphs purporting to depict the offset. Doc. 1532 Tr. 1080, 1223-24; Doc. 1533 Tr. 1395, 1476, 1486, 1488; Doc. 1535 Tr. 2014-15, Doc. 1537 Tr. 2387-88. The same staff members who prepared charts for NDAC meetings falsely showing the offset was provided, simultaneously generated for Exxon senior management internal "before DFC" and "after DFC" graphs showing precisely the opposite. P.Ex. 32, 33, 34, 35, 60; Doc. 1535 Tr. 2015-18.

The event that triggered this lawsuit occurred in a confrontational NDAC meeting in Houston in November 1990, which began with an opening statement from the NDAC to Exxon stating "you have abandoned us." P.Ex. 84. As at all previous NDAC meetings, the dealer representatives asked if Exxon was still providing the offset for the 3% credit fee. Doc. 1532 Tr. 1080. Unlike all the earlier meetings, however, the NDAC representatives thought they heard Exxon's new senior vice president of marketing say that the credit cost recovery fee offset had not been provided in the

past but that he, new to the job, would make sure it was provided in the future (an admission Exxon vigorously denies). Doc. 1537 Tr. 2499-2501. The dispute about the officer's words set off a firestorm. This lawsuit was filed in the federal court a few months later, in May 1991.

At trial, all of Exxon's witnesses admitted that it would not be in good faith or "normal" to fail to provide the promised offset, and conceded Exxon's legal obligation to perform. Doc. 1536 Tr. 2170; Doc. 1540 Tr. 3679-80. The testimony of Exxon's senior vice president of marketing is illustrative:

> Q: Would you agree with me that it would not be good faith for Exxon to promise its dealers for twelve years that it had provided a price reduction and not provide it?
>
> A: I would agree with that. (Doc. 1532 Tr. 1087-88).
>
> * * *
>
> Q: Do you believe it is normal for a company like Exxon to tell its dealers that the offset is being provided and not provide it?
>
> A: No. (Doc. 1532 Tr. 1089).
>
> * * *
>
> Q. So, is it a legal obligation to provide the offset?

> A. It's a statement we made, it's a moral obligation, it's good faith. I think that makes it a legal obligation, yes. (Doc. 1533 Tr. 1537).

Having conceded the existence of the obligation to the Class, Exxon's senior vice president of petroleum marketing also agreed that the only real issue at trial was whether Exxon had in fact performed the obligation:

> Q. So really, the issue is did you provide it, did you provide the offset?
>
> A. Exactly. (Doc. 1532 Tr. 1179-80).

The Course of Proceedings

In August 1994, the Magistrate Judge recommended class certification. App. 223a. In October 1995, the first district court judge certified the case as a Rule 23(b)(3) class action. App. 221a. In ensuing stages of the pretrial proceedings, Exxon twice filed motions to decertify and also petitioned the Eleventh Circuit for mandamus to reverse class certification. All were denied. App. 168a, 215a.

Exxon filed motions for summary judgment which included challenges to Plaintiffs' ability to prove aspects of their claim on a class-wide basis. All were denied. After the initial trial judge's death, the new district judge allowed Exxon to renew all of its previously denied motions. They were again denied with lengthy reported orders concluding that Plaintiffs had established an adequate basis to try duty and breach (61 F. Supp. 2d 1308) and damages (61 F. Supp. 2d 1335) on a class-wide basis. After the district court, *sua sponte*, required additional briefing on the

class-wide determination of Exxon's defenses, the district court entered an additional order with respect to these issues. 188 F.R.D. 667 (App. 172a).

The case was tried to a jury in 2001, ten years after it was brought. The jury returned a unanimous special verdict establishing Exxon's liability and damages on an annual cents-per-gallon basis with respect to each gallon of motor fuel Exxon sold to the Class during the class period (the sum of the credit cost recovery fees collected divided by the total gallons as to which Exxon failed to provide the DFC offset). App. 160a. The district court denied Exxon's post-trial motions, finding more than sufficient evidence to support the verdict. R.App. 1a-15a.

Post trial, over Plaintiffs' objection, the district court adopted the claims administration process Exxon had proposed. Thereunder, a court-appointed Rule 53 special master would calculate the damage awards of individual class members by multiplying the cents-per-gallon damage award of the jury verdict times the gallons of motor fuel purchased by each class member during the class period as reported in Exxon's undisputed sales records. 157 F. Supp. 2d at 1308, 1325. Contrary to Exxon's petition (Pet. at 26), the only issues to be resolved by the special master are ownership of claims, duration of ownership, and any set-offs Exxon asserts against individual dealers. 157 F. Supp. 2d at 1324.[6] The damage factor established by the jury in the special verdict and the number of gallons sold to each dealership is not at issue. *Id.*

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6. In view of the anticipated appeal on the issue of supplemental jurisdiction, the trial court also ordered that the special master would identify those claims that did not meet the jurisdictional minimum. *Id.* at 1325.

Exxon explicitly waived jury trial of the claims to be administered by the special master. Exxon declared: "Exxon will agree as part of this process to waive any right to a jury trial that it might have in connection with such proceedings." R.App. 16a-28a at 22a n.25. In a subsequent hearing before the district court on the claims process, Exxon's counsel reiterated the jury trial waiver, "we have already waived our right to jury trial in that process." Doc. 1426 Tr. 100.

The district court certified the jury verdict, its denial of Exxon's Rule 50 motions, and the order implementing the claims administration process for interlocutory review. A panel of the Eleventh Circuit affirmed. App. 67a. Exxon's petition for rehearing *en banc* was denied, with two circuit court judges dissenting solely on supplemental jurisdiction. App. 1a.

REASONS FOR DENYING THE PETITION

1. There is no Circuit Court Conflict or Other Compelling Reason for the Court to Exercise Discretionary Review of Class Certification

The Eleventh Circuit Opinion

Exxon asserts that discretionary review of class certification is needed for this Court to provide guidance to wayward courts' improper application of Rule 23(b)(3) in multi-state class actions. But since Circuit Judge Peter Fay's widely cited decision in *State of Alabama v. Blue Bird Body Co. Inc.*, 573 F.2d 309 (5th Cir. 1978) almost thirty years ago, the Eleventh Circuit as well as the other circuits have recognized that certification under Rule 23(b)(3) requires a rigorous examination of the manner in which class plaintiffs

propose to prove their claim on a common basis in accordance with the applicable state law. *See, e.g., Andrews v. American Tel.&Tel. Co.*, 95 F.3d 1014, 1024 (11th Cir. 1996); *Castano v. American Tobacco Co.*, 84 F.3d 734, 741-742 (5th Cir. 1996) (citing *Blue Bird Body* and decisions from Second, Third, Fourth, Sixth, and Seventh Circuits reversing class certifications on this ground).[7] The district court met the *Blue Bird Body* requirement in this case.

After a long, careful and thoroughly documented analysis of the facts and state laws applicable to the claim, the district court determined that class certification was appropriate. A panel of the Eleventh Circuit affirmed. In denying Exxon's petition for rehearing *en banc,* not a single member of the Eleventh Circuit agreed with Exxon's position on this issue.

Exxon characterizes the Eleventh Circuit's decision as authorizing "the certification of a multi-state class action where individual reliance by each class member is at issue and where the predominance of common issues can be established only by distorting the law of the applicable states" (Pet. at i). Not only does the opinion contain no such ruling, certiorari is not available to review determinations of fact, *Exxon Co. U.S.A. v. Sofec Inc.*, 517 U.S. 830, 841 (1996), or to challenge lower courts' interpretations of state law, *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983). Moreover, Exxon's characterization of the facts, procedural history and state law is wholly unsupportable.

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7. Judge Fay was one of the three members of the panel of the Eleventh Circuit in this case that rejected Exxon's class certification argument.

Exxon Created the "on-average" Obligation to the Class

Arguing that "the dealers were allowed to transform their individual claims into a special 'classwide breach' claim, under which individual prices and contracts were deemed irrelevant" (Pet. at 23), Exxon ignores the fact that it created the "on average" pricing obligation and the means to measure its performance – "on average, over time and across markets." In response to this argument below, the district court described it as "a 'smoke-screen' to hide from its own self-created obligation established during the creation and implementation of the DFC Program." R.App. at 6a.

Exxon Waived Jury Trial in the Claims Process

Exxon continues to mis-state the record in complaining that the district court deprived it of a jury trial in the claims administration process (Pet. at 26). Exxon authored the procedure about which it complains and expressly waived its right to a jury trial on any fact issues arising from claim ownership issues. R.App. at 22a n. 25. Having urged the matter below, Exxon cannot seek review on this purported error. *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687, 704 (1999).

U.C.C. § 2-305 is Uniform

Exxon's argument that district court altered state law to avoid supposed variations under U.C.C. section 2-305 (Pet. at 27) is equally misguided, as Exxon failed to preserve this issue below thereby precluding certiorari review. *Glover v. United States*, 531 U.S. 198, 205 (2001).

In addition, the cases on which Exxon now relies show no disparity in the operation of section 2-305. Three of the six cases Exxon cites for the proposition that section 2-305 is not uniform involve the law of states which are not part of this class action (Ohio, Michigan and Kansas), the fourth does not even mention 2-305 (*Exxon Corp. v. Superior Court*, 60 Cal.Rptr. 2d 195, 204-205 (Cal. Ct. App. 1997)), the fifth makes no particular distinction between objective or subjective good faith (*Havird Oil Co. v. Marathon Oil Co.*, 149 F. 3d 283, 290-91 (4th Cir. 1998)), and the sixth applied the dual standards of subjective and objective good faith as expressly defined in the U.C.C., just as the district court did in this case. *Richard Short Oil Co. v. Texaco Inc.*, 799 F.2d 415, 422 (8th Cir. 1986).[8]

Exxon's quarrel with the district court's jury instruction over what is "normal" under U.C.C. section 2-305 invites deconstruction of the district court's careful analysis of how the relevant states interpreted the Official Comments of the Code provision. Such an undertaking would be extraordinary for this Court, and is entirely unnecessary here, because, by any definition, Exxon's behavior cannot be viewed as "normal." As the district court noted in denying Exxon's Rule 50 motion on this point, "Exxon's own company representative and expert witness testified on cross

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8. Exxon also maintains that the district court disregarded state law in concluding that Exxon's standard form termination release does not bar class member's claims, but Exxon ignores the principal ground for the court's ruling which was based upon a plain reading of the exceptions set forth in the release. One exception is for claims on "trade accounts" defined in the release as "monies due and owing either party associated with motor fuel purchases"; another exception is for "reimbursement", the dictionary definition of which is "to pay back." 188 F.R.D. at 680-81 nn. 24 & 26, 684.

examination that, if Exxon had in fact done what Plaintiffs claimed Exxon had done, it would not be a 'normal case.'" R.App. at 5a.

There is No Conflict in Circuit Court Decisions Concerning Class Certification of Cases with a Fraudulent Concealment Avoidance to a Limitations Defense

Exxon's arguments on the fraudulent concealment issue fare no better. Exxon first relies upon inapposite federal decisions involving affirmative claims for fraud. While Exxon does identify two cases involving fraudulent concealment avoidances, the decisions reach different results based on their unique facts and circumstances, not on disparate rules of law. *See Broussard v. Meineke Muffler Shops Inc.*, 155 F.3d 331 (4th Cir. 1998) (reversing certification) and *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000) (affirming certification). *Meineke* reversed class certification because with respect to both plaintiffs' affirmative claims and their concealment avoidance, "five significant variations in franchisees' 'factual and legal arguments' make it clear that this case failed to present common questions of law or fact." *Id.* at 346. The *Meineke* Court concluded, "the class the district court certified was no more than 'a hodgepodge of factually as well as legally different plaintiffs' that should not have been cobbled together for trial." *Id.* at 343.

Waste Management, on the other hand, affirmed certification because common issues relating to plaintiff's affirmative claim for breach of warranty predominated over plaintiff's attendant fraud concealment avoidance, ruling that "predominance cannot be reduced to a mechanical, single issue test." 208 F.3d at 296. Thus, these decisions do not conflict on any rule of law. They simply reflect different

outcomes arising from the due application of the predominance requirement of Rule 23(b)(3).

In affirming class certification in this case, the Eleventh Circuit did not ignore state law or misapply Rule 23. Common issues overwhelmingly predominate over individual issues with respect to Plaintiffs' affirmative cause of action for breach of contract. And as to the fraudulent concealment avoidance, Exxon's limitations defense applies to only some class members and would bar only four years of a twelve year class period. Also, the avoidance focuses on Exxon's concealment, not the conduct of individual class members, further adding to the predominance of common over individual issues. *See, e.g., In re: Linerboard Antitrust Litigation Winoff Ind. Inc.*, 305 F.3d 145, 162 (3rd Cir. 2002) (the fact of concealment, that necessarily focuses on the defendant's conduct, is the polestar in an analysis of fraudulent concealment). And, reliance is an element of the concealment avoidance in just 11 of the 35 jurisdictions in issue. App. 185a.

Finally, Exxon argues a view of state law that the district court and the circuit court properly rejected. Every state decision Exxon cites involves an affirmative claim for fraud, not a concealment avoidance to a limitations defense. Most do not involve class actions. Exxon fails to identify a single state court decision ruling that a concealment avoidance cannot be determined on a class-wide basis. Three of the decisions cited are from jurisdictions in which reliance is not an element of the avoidance (New Jersey, Delaware, and Colorado).[9] And contrary to Exxon's assertion that a showing

9. *See Farrell v. Votator Div. of Chemetron Corp.*, 299 A.2d 394, 396 (N.J. 1973); *Resource Ventures Inc. v. Resources Management Int'l Inc.*, 42 F. Supp. 2d 423, 436 (D. Del. 1999); *Rosane v. Senger*, 149 P.2d 372, 375 (Col. 1944).

of personal reliance is always mandated, four of the jurisdictions (California, New York, North Carolina and New Jersey) have reported decisions concluding that reliance can be established on a class-wide basis.[10]

Exxon ensured that its false representations to the dealers' representatives in the NDAC were communicated to the dealer network at large. Contrary to Exxon's supposition, the law is clear that fraud worked upon an agent – here the dealers' NDAC representatives – establishes fraud as to the principal.[11] That the dealer representatives relied on the fraud on behalf of all dealers (as this was their role)was established by "clear and convincing" evidence. R. App. at 8a.

Because there is no genuine conflict in circuit court decisions and because duty, breach, and damages were all established at trial on a class-wide basis pursuant to uniformly applicable provisions of state law, there is no basis on this record for the Court to grant certiorari review of class certification.

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10. *See Vasquez v. Superior Court*, 484 P.2d 964 (Cal. 1971); *Super Glue Corp. v. Avis Rent-a-Car System, Inc.*, 132 A.D.2d 604, 607 (N.Y. App. 1987); *Pitts v. American Security Ins. Co.*, 550 S.E.2d 179, 189 (N.C. App. 2001); *Varacallo v. Massachusetts Mutual Life Ins. Co.*, 752 A.2d 807, 817 (N.J. App. 2000).

11. *See, e.g., Cheek v. Glover,* 1997 WL 601387 *3 (Ark. App. 1997); *Northwestern Bank v. Roseman*, 344 S.E.2d 120, 125 (N.C. App. 1986); *Dryden Waterproofing, Inc. v. Bogard*, 488 So. 2d 672, 673 n.1 (Fla. 4th DCA 1986); *Liberty Nat'l Bank & Trust Co. v. Gruenberger*, 477 S.W.2d 503, 505 (Ky. App. 1972); *El Paso Electric Co. v. Raynolds Holding Co.*, 100 S.W.2d 97, 100 (Tex. App. 1937); *Vulcan Detinning Co. v. American Can Co.*, 67 A. 339, 400 (N.J. 1907); Restatement (Second) of Torts § 533 (1976).

2. The Court Should Decline to Exercise Discretionary Review of Subject Matter Jurisdiction

Although there is conflict among the circuits on the issue of supplemental jurisdiction over those class members whose individual claims are less than the jurisdictional amount of the diversity statute, this case does not present an appropriate vehicle to review the issue.

The Parties' Interests are Not Properly Aligned

The traditional advocates for the competing positions giving rise to the conflict over the meaning of 28 U.S.C. § 1367 – the plaintiff's class action bar on the one hand, and the large, multi-national companies they routinely sue on the other – are not properly represented or aligned in this case. The plaintiff's class action bar has frequently sought to avoid federal jurisdiction over large, multi-state class actions against multi-national corporations like Exxon. Exxon is hardly the appropriate standard bearer for those interests. Indeed, Exxon maintains that "most class actions belong in federal court" and regularly criticizes the class action bar for taking the very position that Exxon espouses here.[12] Nor are Plaintiffs appropriately cast as the spokesman of the

12. While this case was pending, Exxon donated its periodic space on the op-ed page of the New York Times to an article entitled "Class Action Bullies" which argued that "most class actions belong in federal courts." The article asserts that "more and more, class actions have been hijacked by trial attorneys to extract not justice but big settlements," and that, "in most cases, the class claimants receive little of value while the lawyers make millions." The advertisement concludes with support for the Class Action Fairness Act (which has passed the House and is pending in the Senate) which would resolve the circuit court split by providing federal jurisdiction over all large multi-state class actions and bring "some measure of common sense to a system that now enshrines trial lawyer abuse." The article is available on Exxon's website at: http://www.exxonmobil.com/files/corporate/000525.pdf.

world's multi-national corporations which are typically anxious to avoid the state court forums that class action plaintiff's lawyers favor.

In addition to advancing a position contrary to its documented political views, Exxon has no financial stake in the outcome of the issue here one way or the other. Even if Exxon "prevails," class members with claims in excess of the jurisdictional amount (whose claims account for 90 percent of the Class's monetary recovery) will remain in the federal court. And if dismissed, the class members with claims less than the jurisdictional amount would refile in state court on a claim for which Exxon's liability has already been adjudicated.[13]

The integrity of the our adversarial system depends on parties having a "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult [] questions." *Baker v. Carr*, 369 U.S. 186, 203 (1962) (discussing Article III standing requirement). If the Court undertakes to resolve the circuit conflict over supplemental jurisdiction, it should choose a case where the parties are appropriately aligned and best suited to advance the pros and cons of both sides of the debate.[14]

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13. 28 U.S.C. § 1367(d) tolls the statute of limitations pending the final determination of supplemental subject matter jurisdiction. Exxon will be collaterally estopped from relitigating its liability in state court proceedings.

14. Plaintiffs will not add further here to the volumes of argument previously devoted to the debate over the correct interpretation of 28 U.S.C. § 1367 other than to say that the majority of the circuit courts decisions, and the Eleventh Circuit have correctly concluded that the text of the statute clearly conveys jurisdiction in the circumstances presented here.

This Case is a Poor Vehicle for Review and There is an Independent Ground for Subject Matter Jurisdiction

In addition, after over thirteen years of contentious litigation, Exxon's liability has been conclusively established. Breaking the case into parts at this juncture makes little sense. If Exxon is correct as to the importance of the jurisdictional issue and its recurring nature, there will be better opportunities for this Court take review, particularly since early interlocutory review of class certification is now available under Rule 23(f).

Finally, certiorari review is also unnecessary because Plaintiffs have advanced an independent and alternative ground for subject matter jurisdiction over the entire Class. The nature of the duty created by Exxon to rebate the proceeds of the 3% credit cost recovery fee with "on average" wholesale price reductions was, by definition, owed to the Class as a whole. Exxon's breach of its duty caused damage to the Class as a whole. Numerous courts have recognized that the claims of individual plaintiffs may be aggregated in order to satisfy the jurisdictional amount of the diversity statute when suit is brought on a "common and undivided" interest which "exist[s] . . . when the defendant owes an obligation to the group of plaintiffs as a group and not to the individuals severally." *See, e.g., Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1262 (11th Cir. 2000); *Eagle v. American Tel. & Tel. Co.*, 769 F.2d 541, 546-57 (9th Cir. 1985); *Berman v. Narragansett Racing Assoc.*, 414 F.2d 311 (1st Cir. 1969).

Because of the "on average" obligation Exxon created, any dealer attempting to recover against Exxon individually would necessarily have to prove that Exxon failed to provide the price reduction with respect to the Class as a whole. Under these circumstances, the nature of the obligation is

collective,[15] and aggregation to satisfy the jurisdictional amount of the diversity statute is permitted.

CONCLUSION

The petition for certiorari should be denied on both grounds advanced. Should this Court entertain review on the issue of supplemental jurisdiction, Plaintiffs would urge the Court to expressly limit review to that narrow issue, allowing the claims process for the remaining claims – which represent 90 percent of the total damage award – to proceed without further delay.

Respectfully submitted,

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15. Although the district court did not find jurisdiction under this theory (App. 110a), the Court may take this alternative ground into consideration. *E.g., Washington v. Confederated Bands and Tribes*, 439 U.S. 463, 476 n.20 (1979).

APPENDIX

APPENDIX A — ORDER DENYING EXXON'S RULE 50 AND 59 MOTIONS FILED AUGUST 7, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-0986-CIV-GOLD/SIMONTON

ALLAPATTAH SERVICES, INC., et. al.,

Plaintiffs,

v.

EXXON CORPORATION,

Defendant.

ORDER DENYING EXXON'S RULE 50 AND 59 MOTIONS

Exxon has filed a "Renewed Motion for Judgment as a Matter of Law, or in the Alternative, for a New Trial" [D.E. # 1439].[1] For reasons stated in this Order, Exxon's motion is denied.

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1. Exxon claims it is entitled to judgment as a matter of law because: (1) the jury found that Exxon did not have the only pricing obligation on which plaintiffs sought to introduce evidence; (2) there is no legal or factual basis from which to find a contractual pricing obligation that does not require Exxon to provide an offset to each dealer; (3) there is no legal or factual basis from which to conclude that Exxon and any dealer agreed to the "on average" pricing (Cont'd)

Appendix A

I. STANDARDS UNDER FED. R. CIV. P. 50 AND 59

Rule 50 authorizes entry of judgment as a matter of law when "there is no legally sufficient evidentiary basis for a reasonable jury to find for the party." The governing Rule 50

(Cont'd)

obligation; (4) there is no legal or factual basis from which to conclude that Exxon's duty of good faith required the "on average" pricing obligation; (5) there is no legal or factual basis from which to conclude that this is not the "normal case" under U.C.C. § 2-305; (6) there is no evidence from which a reasonable jury could find that Exxon failed to offset credit card fees; (7) Exxon is entitled to judgment as a matter of law on its statute of limitations defense; and (8) Exxon is entitled to judgment as a matter of law on its release defense. In the alternative, Exxon moves for a new trial because, (1) the jury's verdict was against the great weight of the evidence; (2) the jury's verdict was inconsistent; (3) the jury's verdict was the product of confusion and sympathy caused by the improper introduction and use of irrelevant and prejudicial evidence; (4) the Court improperly admitted the expert testimony of plaintiffs' expert, Dr. Fishe; and (5) the Court improperly instructed the jury on the legal standards applicable to plaintiffs' claims and Exxon's defenses. Although not discussed individually in extensive detail, the Court has reviewed each ground asserted and concludes that it lacks merit.

Moreover, a number of Exxon's contentions raise legal issues previously addressed by prior orders of this Court. The Court declines to once again address these issues and simply relies on its prior opinions. See, e.g., April 21 1998, *Order Denying Exxon's Motion for Summary Judgment on Count I* (Kehoe, J.) (D.E. # 908); *Allapattah Servs. Inc. v. Exxon Corp.*, 61 F.Supp.2d 1300 (S.D. Fla. 1999); *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1326 (S.D. Fla. 1999); *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1335 (S.D. Fla. 1999); *Allapattah Servs., Inc. v. Exxon Corp.*, 188 F.R.D. 667 (S.D. Fla. 1999).

Appendix A

test in the Eleventh Circuit is whether there is substantial evidence to support plaintiffs' claims such that a reasonable jury could find in plaintiffs' favor. *United States Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 993 (11th Cir. 1993), *cert. denied*, 512 U.S. 1221, 114 S.Ct. 2710 (1994). That is, a judgment as a matter of law may be granted "only if the facts and inferences 'point so overwhelmingly in favor of the movant . . . that reasonable people could not arrive at a contrary verdict.'" *Bogle v. Orange County Bd. of County Comm'rs*, 162 F. 3d 653, 656 (11th Cir. 1998) (quoting *Richardson v. Leeds Police Dep't*, 71 F.3d 801, 805 (11th Cir. 1995)). But, if the jury verdict is supported by substantial evidence such that reasonable minds could differ concerning material facts, and not just by a mere "scintilla" of evidence, then the motion should be denied, *U.S. Anchor Mfg.*, 7 F.3d at 993.

A Rule 59 motion for new trial may only be granted when the jury's verdict is against the great weight of the evidence. *Carter v. Decision OneCorp.*, 122 F.3d 997, 1004 (11th Cir. 1997). This rule, however, does not grant a license to the trial judge merely to substitute his or her judgment for that of the jury on questions of fact. *Ard v. Southwest Forest Indus.*, 849 F.2d 517, 520 (11th Cir. 1988). Consequently, when considering a motion for new trial, the trial judge may weigh the evidence, but it is proper to grant the motion only if the verdict is against the great, not just against the greater, weight of the evidence. *Id.* Motions for new trial on the basis of erroneous and prejudicial jury instructions are committed to the discretion of the trial court and reviewed to ascertain whether there has been a clear abuse of discretion. *Hicks v. Talbott Recovery Sys., Inc.*, 196 F.3d 1226, 1242 (11th Cir.

1999) (citing *Christopher v. Cutter Labs*, 53 F.3d 1184, 1190 (11th Cir. 1995)).

II. APPLICATION OF THE STANDARDS

Upon review, I conclude there was clearly sufficient evidence to support the jury's verdict such that a reasonable jury could find in Plaintiffs' favor, and, therefore, that the jury's verdict cannot be said to be against the great weight of the evidence. Nor was the jury's verdict conflicting, or, in my view, based on improper jury instructions or improper prejudicial evidentiary rulings.

Under the instructions, the jury first had to ascertain if this was a "normal case" under the Uniform Commercial Code, such that Exxon could not satisfy its duty of good faith by reliance upon the establishment of the "dealer price" or "price in effect" specified in the Dealers' Sales Agreements. The jury found that the Dealers had proven, by a preponderance of the evidence, that facts and circumstances existed during the Discount for Cash Program ["DFC"] that were not the "normal case." (D.E. # 1395, p. 2]. The jury's decision was based on substantial evidence, although reasonable minds could differ. Based on this evidence, the jury was well within its discretion to conclude, as Plaintiffs contended, that it would not be "normal" for Exxon to have assured its dealers for the years of the DFC Program that credit cost recovery fees were being offset with, on average, wholesale price reductions, while secretly carrying out a business plan to eliminate the offset, thereby enhancing its own profits, reducing the dealers' profits, and, at the same time, eliminating a majority of its dealers throughout the

various markets because it was faced with potentially contentious store closings in an environment where dealers might want to exercise their new rights under the PMPA. Indeed, Exxon's own company representative and expert witness testified on cross-examination that, if Exxon had in fact done what Plaintiffs claimed Exxon had done, it would not be a "normal case." [Carter, Tr. p. 1089/4-7; Kalt, Tr. p. 3680/1-11].

Next, the jury was asked to determine if Exxon set its wholesale motor fuel prices to its Dealers in "good faith" during the DFC Program. To do so, the jury was first asked to find the nature and extent of Exxon's good faith obligation to the Dealers during the Class Period, based on the preponderance of the evidence. It did so. It found, as Plaintiffs' contended, that Exxon, based upon its own representations to its Dealers, was required to reduce the wholesale price of motor fuel by an amount that, on average, offset its 3% credit cost recovery fee. [D.E. # 1395, p. 3]. Exxon now contends that its is entitled to judgment as a matter of law because the jury found that Exxon did not have the only pricing obligation Plaintiffs sought to prove Exxon breached. This is incorrect. Although Exxon did its best to confuse the jury as to its obligation to its dealers with the tests used to prove or disprove its performance, Plaintiffs presented the jury with substantial evidence from Exxon's own documents and words that it would reduce the wholesale price of motor fuel charged to its Dealers during the Class Period by an amount that, on average, offset the 3% credit card recovery fee. The evidence further established that Exxon agreed to do so even if a dealer did not adopt and implement the DFC Program. The tools used by Plaintiffs to

prove non-performance of the pricing obligation do not redefine the obligation. In the Court's view, Exxon's argument regarding conflict in the verdict form is a "smoke-screen" to hide from its own self-created obligation established during the creation and implementation of the DFC Program.

Once the jury established the nature of the good faith obligation, the next essential question was whether the Plaintiffs proved by a preponderance of the evidence that Exxon failed to set its wholesale prices of motor fuel to its dealers in good faith. Both Plaintiffs and Exxon agreed that Exxon initially did set its prices in good faith by implementing the DFC Program as it represented. Exxon's defense was that it continued to do so [although it argued it was not "obligated" to do so]. Exxon's representative conceded at trial that if Exxon failed to continue to offset its wholesale prices as represented, it would not have acted in good faith; that is, it would not have acted honestly and by observing reasonable commercial standards of fair dealing as required by the Uniform Commercial Code. [Carter, Tr, p. 1087/23-1097/8].

The jury concluded that Exxon did not act in good faith, and that it failed to reduce its wholesale prices in the manner described from March, 1983, through August, 1994 [when the DFC Program was discontinued] [D.E. # 1395, pp. 5, 9-11]. The jury also found that Exxon was obligated under its individual dealer contracts to do so. [*Id.* at 6]. So, the crucial question in the case boiled down to the following: Did Exxon "take back" the offset that it initially had implemented? That is, was the jury's finding of Exxon's

"breach" based on substantial evidence such that a reasonable jury could find in Plaintiffs' favor? The Court concludes that Plaintiffs provided substantial evidence to the jury to establish breach from which a reasonable jury could base its verdict. The evidence that Exxon "took back" the offset and breached its duty of good faith came in two forms. First, Plaintiffs offered Exxon's own internal business records to show Exxon's "secret plan" to remove the offset, and its success in carrying out the plan to fruition. From these documents, a reasonable jury could conclude that Exxon intended to "recoup the offset" and thereby make $85 million a year in additional annual profits from its dealers. Evidently, the jury was unpersuaded by Exxon's failure to explain away its "short term-long term" DFC planning documents, especially when the drafters of the documents did not testify. The documents left unanswered the clear implication that Exxon's plan was to remove the offset in the long term, and a reasonable jury could so find.

Second, the Plaintiffs offered expert testimony, through Dr. Fishe, to establish that the breach occurred. Dr. Fishe utilized statistical tests to measure Exxon's non-performance of its "on-average obligation," including margin analyses, which Exxon recognized as a viable measure of performance. In performing his analysis, Dr. Fishe relied upon Exxon's own business records, and other analysis, as has been outlined in the Court's Daubert order [D.E. # 1176], By the *Daubert* order, the Court previously found Dr. Fishe's methodologies to be sufficiently reliable. While Exxon's expert, Dr. Kalt, offered contrary opinions, it was the jury's function to conclude which was more credible and persuasive.

Next, the jury's calculation of a damage factor for each year of the DFC program was based on substantial evidence. The "cents-per-gallon damage calculation" was based on the premise, already found by the jury, that no offset was provided from March, 1983, to August, 1994. The damage factor was a function of the total number of gallons sold during each year of the Class Period in relation to Exxon's adopted DFC standard in existence during that year.

Finally, the jury had before it "clear and convincing evidence" that Exxon fraudulently concealed its breach to avoid litigation against it. The evidence was more than "clear and convincing" that year after year, dealer representatives inquired at national meetings whether the offset was being given. They were assured by Exxon's top officials that it was. There was ample proof of dissemination of the misrepresentation by the representatives to dealers throughout the United States.

With regard to Exxon's new trial motion, the Court concludes that no improperly prejudicial evidence was admitted relative to dealer rent, dealer profitability, or the decline in Exxon dealers. All of these matters were otherwise relevant to issues in the cause and, on balance, were not unduly prejudicial.

Rather, when all is said and done, Exxon had a duty of good faith to its dealers. That duty of good faith, under the circumstances of the case, required Exxon to do that which it said it would do, when it persuaded its dealers to modify the way they priced at retail. Exxon was obligated to remove from the wholesale price of motor fuel an amount sufficient,

on average, to offset credit charges. The jury, based on substantial evidence, found that Exxon breached its obligation by not doing so from March, 1983, through August, 1994. The jury also found, based on clear and convincing evidence, that Exxon fraudulently concealed that breach. It awarded damages based on an appropriate factor to be applied to each individual class dealer. There are simply insufficient grounds for judgment as a matter or law or for a new trial.

WHEREFORE, it is

ORDERED AND ADJUDGED that Exxon's Rule 50 and 59 motions [D.E. # 1439] are **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 7 day of August, 2001.

s/ Alan S. Gold
ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

c.c. U.S. Magistrate Judge Andrea M. Simonton

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APPENDIX B — DEFENDANT EXXON CORPORATION'S SUPPLEMENTAL ANSWERS TO PLAINTIFFS' SECOND SET OF INTERROGATORIES TO DEFENDANT EXXON CORPORATION RE: FIRST AMENDED COMPLAINT

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-0986-CIV-KEHOE

ALLAPATTAH SERVICES, INC., et al.,

Plaintiffs,

v.

EXXON CORPORATION,

Defendant.

DEFENDANT EXXON CORPORATION'S SUPPLEMENTAL ANSWERS TO PLAINTIFFS' SECOND SET OF INTERROGATORIES TO DEFENDANT EXXON CORPORATION RE: FIRST AMENDED COMPLAINT

INTERROGATORY 1

Exxon stated, *inter alia*, in response to Request for Admission No. 42 that:

> [I]t can be verified that through its pricing methodology, Exxon reduced its wholesale

> gasoline prices to Exxon's dealers by an amount which, on average, offsets the charge for credit to Exxon's dealers. . . .

Is it your contention that such verification may be accomplished by making any wholesale to wholesale comparison?

RESPONSE

It can be verified through Exxon's pricing methodology that Exxon reduced its wholesale gasoline prices to dealers by an amount which, on average, offsets the charge for credit to its dealers. Comparison of Exxon's wholesale prices with the wholesale prices of its competitors provides additional evidence which confirms that Exxon reduced its wholesale prices to its dealers by an amount which on average offsets the charge for credit to its dealers.

INTERROGATORY 2

If you contend that the verification referred to in the preceding interrogatory may be accomplished by making any wholesale to wholesale comparison, (1) identify with specificity the wholesale prices to which Exxon's DTT would be compared, (2) state in quantitative terns the comparison which you claim would demonstrate the verification (*See e.g.* quote from Exxon document set forth in interrogatory No. 5, *infra*, "*operate with LR parameter ~2.8¢; UR parameter ~3.8¢*" referring to comparison of DTT versus rack), and (3) identify the documents from which the prices may be derived for such comparison.

RESPONSE

2,1. Exxon's pricing methodology used the dealer wholesale prices of its other major oil company competitors. Exxon's methodology used the cash prices for those competitors who priced on a cash basis and calculated cash prices for those competitors who priced on a credit basis.

2, 2. The fact that under the Discount for Cash Program Exxon reduced *its wholesale gasoline prices can be* objectively verified from Exxon's Wholesale Price Development System and the adjustments that Exxon used to set dealer wholesale prices. In that system, Exxon used a wholesale to wholesale comparison as the basis to set its prices.

Exxon sought to price, on average, over time and across markets, competitive with the the net prices of its key competitors. Standard statistical analysis (ie., of differences, means and/or ranges) will show that Exxon's net prices were comparable with (approximately equal to) the net prices of Exxon's key competitors. Because net prices already subtract from credit competitors' prices the DFC adjustment; a net price comparison demonstrates that Exxon provided the discount for cash reduction.

In addition, wholesale price comparisons show that Exxon provided the wholesale price reduction. Statistical analysis will demonstrate that, on average, over time and across markets, Exxon's wholesale prices were below the prices of its key credit competitors by the amount of the discount for cash adjustment. In short, the data will show

Appendix B

that Exxon priced in the cash market and below the credit market.

The data will also demonstrate that Exxon's wholesale prices were comparable to the wholesale prices of its key cash competitors. Statistical analysis will show that, on average, over time and across markets, Exxon's prices were comparable with (approximately equal to) the prices of these competitors, all of which charged a credit card processing fee.

In addition, comparative over time analysis of Exxon's prices will show that Exxon changed its prices in direct response (*i.e.*, with reasonable timeliness and in comparative amounts) to changes in the prices of its key competitors', either actual or calculated. Significant and high correlation in the changes in Exxon's prices relative to its key competitors' prices demonstrates that Exxon's prices were the result of a cash basis pricing methodology and this pricing methodology genuinely effectuated a cash DTT.

These price comparisons will be the subject of expert testimony. Exxon will provide a summary of that testimony in accordance with the Court's scheduling order.

2,3. The documents and data from which the prices may be derived are the Exxon Wholesale Price Development System (Mogas Dealer Monitors, Mogas Market Adjustment Reports and Motor Gasoline Price Monitors) and the Exxon pricing database, which have previously been produced to plaintiffs, as well as independent pricing information available from Lundberg for the period August 1982 - August 1994.

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APPENDIX C — EXCERPTS FROM RESPONSE OF EXXON CORPORATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR ENTRY OF ORDER ON PROCEDURE FOR DETERMINATION AND ENTRY OF FINAL JUDGMENT DATED MAY 11, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-0986-CIV-GOLD

ALLAPATTAH SERVICES, INC., et al.,

Plaintiffs,

v.

EXXON CORPORATION,

Defendant.

RESPONSE OF EXXON CORPORATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR ENTRY OF ORDER ON PROCEDURE FOR DETERMINATION AND ENTRY OF FINAL JUDGMENT

Exxon Corporation submits this response in opposition to plaintiffs' motion for entry of an order on procedures for-determination and entry of final judgment.

* * *

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VI. EXXON'S PROPOSED POST-TRIAL PROCEDURES

As is evident from the foregoing discussion, Exxon believes that the Court should now proceed with a claims administration process that would consist of a claims period, a process for determining the validity of any contested claim and the entry of a Final Judgment. It should be a process in which Exxon participates with the right to raise all proper issues or objections. A proposed order for that process is attached as Exhibit B.

In addition, the Court should enter an order on the jury's special Verdict. It should not be a Final Judgment because .there has been as yet no resolution of damages due to the individual class members. This case is not different from a determination on summary judgment or a verdict in the first phase of a bifurcated trial. In those circumstances, no final judgment can be entered until after damages have been determined. *See n.2*. Exxon's proposed order is attached as Exhibit C.[19]

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19. While Exxon proposes that an "Order" be entered, it could be entitled an "Interim Judgment" so long as the operative language makes clear that it is not a Final Judgment. Although not a Final Judgment, this Court could utilize the procedure in 28 U.S.C. § 1292(b) to authorize an immediate appeal. *See, e.g., Steering Committee v. United States*, 6 F.3d 572 (9th Cir. 1993) granting review for "all liability issues"; *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 479 F.Supp. 1118 (E.D.N.Y. 1978) holding that the determination of the liability phase of multiparty litigation constituted a controlling question of law for the purposes of 28 U.S.C. §1292(b). If the Court were disposed to enter such an Order, Exxon would file its Rule 50 and Rule 58 motions so that, if denied, those rulings could be incorporated into the § 1292(b) order.

A. Procedures for Determining Damages Due to Individual Class Members

Plaintiffs recognize that it will be necessary to conduct further proceedings in which notice is sent to members of the class, class members wishing to claim damages must submit proof of claim forms and the damages suffered by each individual class member are determined. The award of damages to an individual class member will involve: (i) identifying the station or stations at which the class member was a dealer, (ii) determining the time period during which the class member was a dealer at that station, and (iii) multiplying the gallons of gasoline sold to the station during that period by the measure of damages applicable during that time period.[20]

The Court should not assume that there will be clear and unambiguous records of who were dealers or the times that they were dealers. While plaintiffs have variously referred to the class as consisting of "10,000 dealers", *See, e.g.*, Trial Tr. pp. 262, 263 and 914, the exact size of the class has never been known and, given the passage of time and the condition of the records, it probably never will be known. That is because while Exxon has computerized records which show sales by month by station, Exxon did not keep and does not have comprehensive computerized records or summaries of the time periods that particular individuals were dealers at

20. By submitting its proposal for a post-trial claims process, Exxon does not waive its objections to the jury's verdict or its claim that it is entitled to either Judgment as a Matter of Law or a new trial.

specific stations. As a result, there is no readily available list of class members or records of times when each class member was a dealer.[21]

Exxon does have individual dealer files archived in storage. However those files were not established or maintained for litigation purposes and only contain documents generated in the ordinary course of business. The only way to obtain information from those files is by manual review and to date that has not been done on a systematic basis by either Exxon or plaintiffs[22]. Exxon has, however; done spot checks of some files -- as where, for example, dealers were listed as potential trial witnesses - and the results show it is likely that in a significant number of those files the records will be incomplete. It will therefore be necessary that individual class members who wish to submit claims produce records, such as copies of their Sales Agreements (or other types of evidence), which demonstrate the time periods during which they were dealers at a particular station.

Under the circumstances, there will undoubtedly be claims that will be incomplete, especially in the early years of the DFC program. There will also undoubtedly be instances of disputes between class members regarding the identity of

21. This was disclosed ins detail in 1996 in connection with producing data for the original notice to the class. *See, e.g.*, Exxon Corporation's Notice of Filing dated Nov. 21, 1996, Doc. En. 598.

22. The dealer files were made available to the plaintiffs in 1997. Due to the logistics involved, while plaintiffs examined some files, they declined to systematically review all the files.

the dealer at a station during a particular tine period[23] or disputes about which dealer owns the claim for a particular station.[24] In order to resolve such disputes and for other reasons, *see* Fed. R. Civ. P. 17, each class member submitting a claim must also provide evidence that he is the real party in interest with regard to the Sales Agreements on which his claims are based (i.e. that he is-the individual, corporation, partnership or other entity that was the party to the Sales Agreements that give rise to the claim). And, there will have to be an adjudicatory process to determine all disputes and resolve conflicting claims together so all parties have notice and an opportunity, to be heard.

To establish a claims process to handle and adjudicate class member claims Exxon submits that the following should occur:

1. *Claims handling process.* The Court should direct the Clerk of the Court to meet, or his designee representative to meet, with the parties to develop a process for the filing, handling and administration of the individual

23. For example, two dealers may have been dealers at the same station during a particular year. To avoid duplicative recovery, it will be necessary to determine the precise dates during which each was a dealer at that station. Because Exxon's station records only contain monthly data on fuel volumes, there may also be disputes between such dealers over the particular gallonage to which each is entitled.

24. For example, a dealer who sells or assigns his rights under a Sales Agreement to a new dealer may (or may not) have reserved any claims he has in this litigation. If so, it will be necessary to determine which dealer is the owner of the claim under the Sales Agreement.

class member claims. Said meeting should occur within 15 days (or such other time as the Court directs) and the Clerk of the Court should 'be directed to report to the Court within 30 days thereafter his proposed procedures for the handling of individual class member claims. The parties should have 15 days thereafter in which to file any objections or counter proposals.

2. *Class Notice.* The parties should be directed to meet and confer within 15 days (or such other time as the Court directs) concerning the form of notice to be provided to class members to start the claim process: The notice should include a claim form and information concerning what supporting documents or data is to be supplied with the claim. Exxon submits that at a minimum the claims should be notarized and should include proof that the person or entity submitting the form was an Exxon dealer during the class period; proof that the person or entity submitting the claim has the- capacity to sue; the identity of the station or stations at which the claimant was an Exxon dealer; and the period of time at which he was an Exxon dealer at each station.

In addition to the form of notice and claim form; the parties should also be directed to confer on the following:

a. The time within which class members shall have to submit claims. Exxon submits that the period should be 60 days.

b. The time within which Exxon shall have to file objections to claims, including objections based on the Court's rulings on limitations and releases.

Within the objection period Exxon should also identify any claims it has by way of set-off against the claims submitted by any class member. Exxon submits that this period should be 60 days.

If the parties agree on some or all of the foregoing, they should report to the Court within 15 days of their meeting. To the extent there is no agreement, plaintiffs should submit their Proposals within 15 days. Exxon should respond within 15 days.

3. *Court Decisions.* To the extent necessary, the Court should resolve any issues or disputes arising from the above procedures and set a schedule for class notice, the period for filing claims and the time for Exxon objections.

4. *Adjudicatory Process.* The parties should be further directed to meet and confer within 60 days (or such other time as the Court directs) for the following purposes:

a. Determination of a process by which incomplete or conflicting claims requiring adjudication are identified so that notice can be given and conflicting claims can be adjudicated together.

b. Determination of a non-jury process[25] to resolve objections and competing claims. The subjects to be covered for this process should include use of a Magistrate or Special Master;

25. Exxon will agree as part of this process to waive any right to jury trial that it might have in connection with such proceedings.

the types of proof or evidence which may be considered; the rules of evidence to be applied; and the form of order to be utilized for decision.

c. Determination of a process to establish the "Good Faith" amount of claims for purposes of the Court's jurisdiction under 28 U.S.C. § 1332.[26]

The parties shall report to the Court their agreements or positions on the adjudicatory process within 30 days of their meeting.

5. *Discovery re Interest Calculations.* At the March 1, 2001 Status Conference, plaintiffs announced that they had retained Gary Gross as an "accounting expert" to "calculate interest for each of the thirty five states". Tr. at p. 14, 15. Mr. Gross was initially disclosed by plaintiffs as an expert witness on January 27, 1997, Doc. En. 669,[27] but was withdrawn when Exxon sought to take his deposition. When plaintiffs reintroduced Mr. Gross at the March 1, 2001 Status Conference and stated that they intended to rely on work he had performed, Exxon stated that it wanted discovery of his work. Plaintiff responded:

26. Even if the Court does not revisit the issue of subject matter jurisdiction, determination of the "Good Faith" amount of claims can save judicial labor because, with that information in the record, the Eleventh Circuit Court of Appeals could fully resolve the issue without any neeessity for remand.

27. The expert "report" filed in 1997 made no mention of any interest calculations.

> MR. STEARNS: And we agree with that, Your Honor. When Mr. Gross is finished with his report, we would give his report on interest, and assuming Mr. Stewart wants to depose him, we agree, he should be deposed.

Tr. at p. 46, 47.

Provisions need to be made for production of Mr. Gross's report and supporting documents and a time set for his deposition.

B. Entry of Judgment

Once the claims process has been initiated, all agreed to claims should be certified to the Court for entry of a Final Judgment. Adjudicated claims should also be certified to the Court for the same purpose. At the conclusion of the claims process; the Court should then enter a Final Judgment for the total amount of all individual claims for compensatory damages plus prejudgment interest as applicable.

CONCLUSION

For all of the foregoing reasons, the Court should reject plaintiffs' motion and enter the orders submitted by Exxon. A proposed order for denial of the plainttiffs' motion is attached as Exhibit D.

Respectfully submitted,

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Dated: May 11, 2001

Appendix C

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-0986-CIV-GOLD

ALLAPATTAH SERVICES, INC., et al.,

Plaintiffs,

v.

EXXON CORPORATION,

Defendant.

PROPOSED ORDER ON SCHEDULE FOR FURTHER PROCEEDINGS

THIS CAUSE came before the Court for adoption of post-trial proceedings following the Special Verdict of the jury. After due consideration in the premises, it is hereby ORDERED AND ADJUDGED as follows:

1. The parties are directed to meet with the Clerk of the Court or his designated representative within fifteen (15) days of the date of this Order for the purposes of developing a process for the filing, handling and administration of individual class member claims in this matter. Within thirty (30) days of said meeting the Clerk of the Court is directed to report to the Court on his proposed procedures for the

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handling of said claims. The parties shall have fifteen (15) days thereafter to file any objections or counter-proposals.

2. The parties are further directed to meet and confer within fifteen (15) days from the date of this Order concerning the form of notice to be provided to class members to start a claim process. The notice should include a claim form and information concerning what supporting documents or data is to be supplied with the claim. In addition, at the same time, the parties are directed to confer concerning the time within which class members shall have to submit claims and the time within which Exxon shall have to file objections or setoffs to claims. To the extent that the parties agree they should report to the Court within fifteen (15) days of their meeting. To the extent there is no agreement, plaintiffs shall submit their proposals within fifteen (15) days and Exxon shall respond within fifteen (15) days.

3. Following submission of the matters referred to in paragraphs 1 and 2, the Court shall set a schedule for class notice, the period for filing claims and the time for Exxon's objections.

4. The parties are further directed to meet and confer within sixty (60) days of the date of this Order for purposes of establishing a process for (a) determination of a method by which incomplete or conflicting claims requiring adjudication are identified; (b) determination of a non jury process for adjudication of such claims; and (c) determination of a process to establish a good faith amount of claims. The parties shall report to the Court within thirty (30) days of their meeting concerning their agreements or positions on said matters.

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5. The plaintiffs are directed to serve and file the expert report of Mr. Gary Gross within thirty (30) days from the date of this Order and to arrange for Mr. Gross's deposition by Exxon within thirty (30) days thereafter.

DONE AND ORDERED in Chambers at Miami, Florida this ___ day of _____, 2001.

_____

UNITED STATES DISTRICT JUDGE